SUPREME COURT, U. S.

Office-Supreme Court, U.
FILED
DEC 16 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 843

LEE ROY LEACH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. S. Moore
200 Petroleum Building
Jackson, Mississippi 39201
Attorney for Petitioner

E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106. HArrison 1-8080

INDEX

Introductory Statement 1

Jurisdictional Statement 2

Question Presented for Review 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 5

Argument 5

1. Was the petitioner prejudiced by the failure of the trial court to grant a mistrial as to him at the close of the government's case, and after the trial court (a) sustained a motion for judgment of acquittal as to both defendants to the conspiracy count, (b) sustained a motion for judgment of acquittal as to petitioner on two of three substantive counts, (c) overruled an alleged co-conspirator's motion for judgment of acquittal to four substantive counts, and (d) granted a mistrial as to the alleged co-conspirator?

Conclusion 7

Appendix A—Opinion of United States Court of Appeals, Fifth Circuit A1

Appendix B—Judgment of United States Court of Appeals, Fifth Circuit A3

Appendix C—Pertinent Statutes and Rules of Criminal Procedure A4

Authorities Cited

CASES

Schaffer v. *United States*, 362 U.S. 511 ..... 5, 6, 7

United States v. *Goss*, 329 F.2d 180 (C.A. 4, 1964) 7

Ward v. *United States*, 289 F.2d 877 (C.A. D.C., 1961) 7

STATUTES OF THE UNITED STATES

Rule 8(b), Federal Rules of Criminal Procedure 3
Rule 14, Federal Rules of Criminal Procedure 3
26 USC 5604(a)(1) 3
28 USC 1954(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

LEE ROY LEACH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTORY STATEMENT

The petitioner, Lee Roy Leach, respectfully petitions for a writ of certiorari to review a judgment and order made by the Court of Appeals for the Fifth Circuit not yet reported, but styled, "Lee Roy Leach v. United States", affirming a judgment against the petitioner made and entered by the United States District Court for the Northern District of Mississippi, Eastern Division, on October 6, 1967.

The opinion of the Court of Appeals is appended and bound with this petition.

This case was decided by the United States Court of Appeals for the Fifth Circuit on October 17, 1968, and judgment was entered that date. The petitioner did not receive notice that his case had been affirmed until November 12, 1968. Associate Justice Black extended the time within which to file a petition for a writ of certiorari to December 16, 1968, without prejudice to the Court's consideration of whether the application had been timely presented. An affidavit justifying untimely filing, with supporting documents, has been filed with this Court for its consideration.

A Multilith Record was filed with the Court of Appeals for the Fifth Circuit and a certified copy of the Multilith Record, and a certified copy of the proceedings in the Court of Appeals for the Fifth Circuit has been filed. All references herein to the record are to the Multilith Record.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of *28 USC 1954 (1)*.

QUESTION PRESENTED FOR REVIEW

1. Was the petitioner prejudiced by the failure of the trial court to grant a mistrial as to him at the close of the government's case, and after the trial court (a) sustained a motion for judgment of acquittal as to both defendants to the conspiracy count, (b) sustained a motion for judgment of acquittal as to petitioner on two of three substantive counts, (c) overruled an alleged co-conspirator's motion for judgment of acquittal to four substantive counts and (d) granted a mistrial as to the alleged co-conspirator?

STATUTES INVOLVED

This case involves *26 USC 5604 (a) (1)* and *Rules 8 (b)* and *14, Federal Rules of Criminal Procedure,* the full text of which are appended and bound with this petition.

STATEMENT OF THE CASE

The petitioner was jointly indicted with James Nathan Thrasher in a seven count indictment. Count One charged a conspiracy between the petitioner and Thrasher; Count Two charged petitioner with a substantive offense; Count Three charged the petitioner and Thrasher jointly with a substantive offense; Counts Four, Five and Six charged Thrasher only with substantive offenses; and Count Seven charged the petitioner with a substantive offense. Motions for severance were timely made by petitioner and Thrasher prior to the trial of the case (R. 366 and 368), and the motions were overruled (R. 368).

The petitioner and Thrasher were put to trial jointly on the seven count indictment. At the close of the government's case, motions for judgment of acquittal were made on behalf of petitioner and Thrasher on all counts of the indictment. The motions were sustained as to the conspiracy count as to both defendants; the motions were sustained as to Counts Three and Seven as to the petitioner; the motion was overruled as to Count Two against the petitioner; and the motion was overruled as to four counts standing against Thrasher. The petitioner and Thrasher then renewed their motion for severance and moved for mistrials. The trial court sustained the motion for a mistrial as to Thrasher and overruled as to the petitioner. The trial then proceeded against the petitioner

on Count Two of the indictment, which was a charge of the possession of non-tax paid liquor.

The government's evidence against the petitioner and Thrasher was presented almost entirely by the same witnesses, Mack Parkes and Earle Morris. The testimony of those two witnesses was interweaved in the sense that the line of questioning and testimony went back and forth from one defendant to the other. There were numerous references to the location of petitioner's property in relation to a still site (R. 54, 71, 72 and 118). There was testimony by an expert witness attempting to link the petitioner to the still (R. 207, 208).

The witness Parks testified that on February 3, 1967, he raided a still which was about one-half mile from the petitioner's home. Earle Morris testified that he made a seizure of a still a distance of about half a mile from the petitioner's premises (R. 118). The witness Morris also testified that he caught Thrasher at a still, finding a rubberized overall which Thrasher was wearing matching a rubberized coat found at the still, and also found paper bags on Thrasher's person which matched paper bags found at the still, where Thrasher gave a false name (R. 133, 134, 135, 152, 153 and 146).

The only testimony in the record from which a jury could find guilt of the petitioner was the testimony of the witnesses Parkes and Thompson (R. 51, 53 and 91) that the petitioner had made statements to them that someone stole whiskey belonging to the petitioner, which was denied by the petitioner (R. 278, 279); the testimony of Earle Morris that Morris found liquor stashes near petitioner's property; and the testimony of Morris that paths led from petitioner's property to the stashes (R. 132-135). All of this was reasonably explained by the petitioner (R. 282-284).

REASONS FOR GRANTING THE WRIT

The decision rendered by the Court of Appeals for the Fifth Circuit is, with deference, in conflict with *Schaffer* v. *United States,* 362 U.S. 511. This case involves an important question of Federal law which should be settled by this Court, under its general supervisory powers.

ARGUMENT

1. Was the petitioner prejudiced by the failure of the trial court to grant a mistrial as to him at the close of the government's case, and after the trial court (a) sustained a motion for judgment of acquittal as to both defendants to the conspiracy count, (b) sustained a motion for judgment of acquittal as to petitioner on two of three substantive counts, (c) overruled an alleged co-conspirator's motion for judgment of acquittal to four substantive counts, and (d) granted a mistrial as to the alleged co-conspirator?

Schaffer v. *United States,* 362 U.S. 511, was a five-to-four decision. Mr. Justice Clark delivered the opinion of the Court, with whom Mr. Justice Frankfurter, Mr. Justice Harlan, Mr. Justice Whittaker and Mr. Justice Stewart concurred. Mr. Justice Douglas delivered the dissenting opinion, with whom the Chief Justice, Mr. Justice Black and Mr. Justice Brennan concurred. Conspiracy was put to new dangerous uses much more in this case than in the *Schaffer* case. In *Schaffer,* there was a criminal connection proved between all of the defendants and the Stracuzza brothers, who were the common center of the schemed transport stolen goods, but the brothers did deal with the other co-conspirators

individually, and thus all could be linked to the Stracuzza brothers. The majority held there was sufficient proof in *Schaffer* of the participation of all the defendants in the overall operation of the scheme through their dealings with the Stracuzza brothers, and there was no prejudice arising from the defendants being tried together on the substantive counts of the indictment, which applied individually to each of the defendants. In this case, there is nothing in this record to connect petitioner and Thrasher, and hence no conceivable, legitimate reason why petitioner's case should have been submitted to a jury which had heard anything more than admissible evidence against the petitioner alone.

It is no answer that the severance at the conclusion of the government's case cured this error, for the petitioner was entitled to no less than a completely unbiased jury to decide his case solely on the evidence against him, rather than a jury whose minds had to be purged or biased by the trial court, which was impossible under these circumstances. The trial court was at pains to give appropriate cautionary instructions. The question is whether these cautionary instructions were sufficient. The Court of Appeals held that they were sufficient.

The petitioner moved for severance at the earliest opportunity, renewed his motion at every opportunity, moved the trial court for a mistrial and moved the Court for a new trial after conviction. The petitioner gave the trial court every conceivable opportunity to cure the error.

In arguing against severance, the United States Attorney stated (R. 261-262) that the government acted in good faith in jointly indicting the two defendants for conspiracy, but admitted that after further interview of

witnesses and consideration of a search, the government did not put on the witnesses to two of the overt acts charged in the indictment. This petitioner should not be denied a basic constitutional right to a fair trial because the government had not been diligent prior to indictment or trial in determining whether the government had a conspiracy case. To do so would be to reward the government for its lack of diligence at the expense of the petitioner. The strained construction of *Schaffer* has resulted in an accused's right to a fair trial depending upon the fair-mindedness of the prosecutor more than any other single fact. *Schaffer* has been distorted to mean that if the government joins two persons in the same indictment who are totally and unconnected strangers charged with totally and unconnected offenses, the accused cannot complain if the trial court takes pains to give appropriate cautionary instructions.

There are other authorities concerning these questions, noteworthy of which are *Ward* v. *United States,* 289 F.2d 877 (C.A. D.C., 1961); and *United States* v. *Goss,* 329 F.2d 180 (C.A. 4, 1964). The petitioner, however, bases his petition on this Court's interpretation of *Schaffer,* which petitioner, with deference, submits is contrary to the interpretation placed thereon by the United States Court of Appeals for the Fifth Circuit in this case.

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this petition for a writ of certiorari should be granted, and that the judgment of the Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Mississippi, should be set aside, the

judgment of conviction reversed and this cause remanded for a new trial.

Respectfully submitted,

W. S. MOORE
200 Petroleum Building
Jackson, Mississippi 39201
Counsel for Petitioner

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25766

LEE ROY LEACH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(October 17, 1968)

Before GEWIN and BELL, Circuit Judges and BOOTLE, District Judge.

PER CURIAM: Appellant was jointly indicted with James Nathan Thrasher for violating statutes relating to distilled spirits. The first count charged both with a conspiracy. Counts two and seven charged appellant with separate substantive violations. Count three charged appellant and Thrasher jointly with a substantive violation. Counts four, five and six charged Thrasher with substantive violations.

Each defendant filed motions for severance prior to trial and these were overruled. At the close of the government's case a motion for judgment of acquittal was granted as to both defendants on the conspiracy count and as to appellant on Counts three and seven. This left Count two standing against him and Counts three, four, five and six standing against Thrasher. Both defendants renewed their motions for severance and for mistrials. The court granted Thrasher's motion for severance by declaring a mistrial as to him.

The case proceeded against appellant on Count two, possession of non-tax paid liquor. Having been convicted, he now contends that the trial court erred in overruling his motion for severance and for mistrial. He asserts that the evidence adduced against Thrasher prejudiced him under the circumstances. We find no merit in this contention. Whether the court should have granted severance as to appellant was a matter of discretion. *Garcia* v. *United States,* 5 Cir., 1963, 315 F.2d 679. There is no basis for finding an abuse of discretion. Cf. *Schaffer* v. *United States,* 362 U.S. 511 (1960). Here the court was at pains to give appropriate cautionary instructions and we think these were sufficient.

AFFIIRMED.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 25766

D. C. Docket No. CRE 6798

LEE ROY LEACH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

Before GEWIN and BELL, Circuit Judges
and BOOTLE, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file;

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, Affirmed.

October 17, 1968

Issued as Mandate: November 8, 1968.

APPENDIX C

26 USC 5604 (a)(1)

Any person who shall—

(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section; * * * shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

Rule 8(b), Federal Rules of Criminal Procedure

Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, Federal Rules of Criminal Procedure

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 843

LEE ROY LEACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 402 F.2d 268. The opinion of the district court appears in the record at pages 396 to 405.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1968. On November 21, 1968, Mr. Justice Black extended the time for filing a petition

for a writ of certiorari to December 16, 1968, reserving the question of timeliness of the application, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in refusing to grant a mistrial at the close of the government's evidence, when it dismissed a conspiracy count and granted a severance to petitioner's co-defendant.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted of knowingly possessing 543 gallons of non-taxpaid liquor, in violation of 26 U.S.C. 5604(a)(1). He was sentenced to imprisonment for two years, eighteen months of which was suspended as provided in 18 U.S.C. 3651 (R. 362-366, 414-415). The court of appeals affirmed.

The evidence at trial showed that on January 10, 1967, petitioner called the deputy sheriff of Winston County, Mississippi, to report that someone was stealing his whisky. Accompanied by a highway patrolman, the deputy met petitioner at a place about a half-mile from the latter's house. Petitioner and another man were armed and guarding a dead[illegible]nd road leading down into the woods. Petitioner said that he had blocked in some men named Fredericks and had possibly hit one of the boys in the car (R. 87-90). The officers, after going down the road a short dis-

tance and finding an abandoned car, told petitioner he would have to make out papers before they could proceed further. Petitioner said that he might have to pay a whisky fine but he was going to stop the Fredericks, who were stealing whisky from his main stash (R. 90-93).[1]

On the following day an agent of the Alcohol and Tobacco Tax Unit made an investigation of premises in the neighborhood of petitioner's farm. He found three stashes of non-taxpaid whisky, totaling 543 gallons, at distances of ten to twenty yards from petitioner's north property line. There were well-defined paths from petitioner's property leading to the stashes and the only vehicular access led by petitioner's barn (R. 123-140).

On February 3, 1967, the federal officers seized an illicit still on land adjoining petitioner's property, situated about one-half mile from petitioner's house. They saw co-defendant Thrasher at a distance of about forty yards from the still, walking toward it. Thrasher took flight, but was caught and arrested (R. 118-119, 141-146). Fingerprints on bottles at the still site corresponded with those of Thrasher (R. 158-162, 218-225).

At the conclusion of the government's case, the trial judge made rulings which limited the issues to count 2, charging petitioner with possession of 543 gallons of non-taxpaid liquor. A severance was granted as to Thrasher who was named as co-defendant

---

[1] A week later, petitioner was in the office of the deputy sheriff and said that "it was too bad to get out and make whisky and let somebody else steal it from you" (R. 53).

in a conspiracy count and charged with several substantive offenses.[2]

ARGUMENT

Although a trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice should appear, dismissal of a conspiracy count does not necessarily establish prejudice. *Schaffer* v. *United States*, 362 U.S. 511, 516. The trial court here, "out of an abundance of caution" (R. 400-401), granted a severance to co-defendant Thrasher, who conceivably could have been prejudiced by petitioner's unusually frank admissions and by the fact that count 3, which charged both defendants jointly with operation of an illicit still, was left standing against Thrasher. There was nothing in the evidence relating to Thrasher, however, which, by admission or otherwise, tended to prejudice petitioner. In view of the simple factual situation, the severance of Thrasher and the clear instructions to disregard all evidence relating to Thrasher or the still, the court acted within its sound discretion in refusing to grant a mistrial to petitioner. *United States* v. *Branker*, 395 F. 2d 881, 887 (C.A.

---

[2] Motions for judgment of acquittal by both defendants were ruled on as follows: Count 1, conspiracy, sustained; count 2, possession by petitioner of non-taxpaid whisky, denied; count 3, possession and control of an unregistered still by both defendants, motion sustained as to petitioner, denied as to Thrasher; counts 4, 5 and 6, substantive charges against Thrasher, denied; count 7, substantive charge against Thrasher, sustained. Motions for mistrial and severance were sustained as to Thrasher and denied as to petitioner (R. 245-254, 271-273).

2); *United States* v. *Elgisser*, 334 F. 2d 103 (C.A. 2), certiorari denied *sub nom. Gladstein* v. *United States*, 379 U.S. 879; *United States* v. *Manfredi*, 275 F. 2d 588, 593 (C.A. 2), certiorari denied, 363 U.S. 828; *United States* v. *James*, 378 F. 2d 88, 91 (C.A. 6); *United States* v. *Morgan*, 394 F. 2d 973 (C.A. 6), certiorari denied, November 12, 1968, *sub nom. DeFoe* v. *United States*, No. 444 Misc., O.T. 1968; *United States* v. *Jordan*, 399 F. 2d 610, 615 (C.A. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JANUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 330199 408